

STATE OF MICHIGAN
COURT OF APPEALS

DROST LANDSCAPE INC.

Plaintiff-Appellant/Cross-Appellee,

v

DERITA DOWNEY and ROBERT DOWNEY,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
March 5, 2013

No. 308146
Charlevoix Circuit Court
LC No. 11-049823-CK

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

WHITBECK, J. (*concurring*).

With great respect for my colleagues' approach to this case, I must concur in result only. I do so for several reasons.

First, we must remember that this appeal involves *only* whether the trial court erred in awarding sanctions to the defendants Derita and Robert Downey on the basis that the plaintiff Drost Landscape, Inc. filed a frivolous claim. Drost did not appeal the trial court's dismissal of its claim under MCR 2.116(C)(7) (*res judicata*) or, alternatively, under MCR 2.116(C)(8) (failure to state a claim on which relief should be granted). These dismissals are only relevant to the extent that they bear upon the sole question before us: were Drost's claims so devoid of arguable legal merit that sanctions against it were appropriate?

But, indirectly, the majority weighs in on the merits of the *res judicata* issue when it states that Drost's claim of unjust enrichment "could not have been subject to *res judicata* because there was no prior litigation between the parties to the present case." If I understand Downey's position at the trial court level, it was that Drost should have joined the Downeys in Drost's lawsuit against the Vicks under the mandatory joinder rule, MCR 2.205(A), as necessary parties. This was apparently the trial court's reasoning when it dismissed Drost's claim on the basis of *res judicata*.

Again, Drost did not appeal this dismissal and makes no real mention of it in its brief on appeal. Thus, Drost has abandoned on appeal the whole question of the validity of the dismissal based on *res judicata*. This Court should not be in the business of deciding, even in a single sentence, issues that the parties have abandoned and that are not before us. Based on the facts of this case and the utter lack of briefing on this issue, the only thing I am prepared to say is that a judge's ultimate decision to dismiss a case based on *res judicata* is, in my opinion, in and of itself

not enough to automatically find that the dismissed claim is devoid of arguable legal merit and therefore frivolous.

Second, the majority's statement that Drost's claims of unjust enrichment "are wholly their own, and not dependent on the Vicks' rights" runs contrary to Drost's assertions below *and* on appeal. According to Downey's brief to this Court, Drost's attorney below "indicated it was claiming its unjust enrichment claim arose from the Assignment it received from Mr. and Mrs. Vick" and that Drost was enforcing the Vicks' rights against the Downeys.

Ordinarily, I would not rely exclusively upon one party's brief and I am not doing so here, for the simple reason that Drost asserted below that its unjust enrichment claim arose from the assignment, and asserts *exactly the same thing on appeal*:

Admittedly, "a third party is not unjustly enriched when it receives a benefit from a contract between two other parties . . . in the absence of some misleading act by the third person." . . . Because of that rule, Drost does not itself have a direct claim against the Downeys, which is the very reason that led Drost to negotiate an assignment from the Vicks of their claims against the Downeys. . . . Accordingly, in the instant lawsuit, *Drost is enforcing the Vicks' claim of unjust enrichment against the Downeys*. [Emphasis supplied].

As with the res judicata dismissal, the trial court's alternative ruling that Drost failed to state a claim on which relief can be granted is not before us. However, the parties have extensively briefed this issue—both parties cite *Morris Pumps v Centerline Piping*¹ and the majority relies on this case as controlling. Certainly *Morris Pumps* is not controlling if Drost is only "enforcing the Vicks' claim of unjust enrichment against the Downeys."

I agree, however, that *Morris Pumps* has considerable factual similarity to this case *if* we can conclude as the majority does—contrary to Drost's own direct assertions to this Court—that Drost's claim of unjust enrichment is wholly its own and is *not* dependent on the Vicks' rights. I do note, however, the following general statement in *Morris Pumps*, taken from 66 Am Jur 2d, Restitution and Implied Contracts:

[a] third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefitted has not requested the benefit or misled the other parties. . . . Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, *unjust enrichment*, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, *in the absence of some misleading act by the third person*, the mere

¹ *Morris Pumps v Centerline Piping*, 273 Mich App 187; 729 NW2d 898 (2006).

failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person.²

Here there are two contracts: (1) the land contract between the Vicks and Derita Downey for the conveyance of the property, and (2) the contract, of whatever sort, between Drost and the Vicks for landscaping at the property. For purposes of the Drost claims, the land contract is irrelevant, other than for its provision stating that the improvements become the property of the seller (Downey) if the purchaser (the Vicks) defaulted, which of course they did.

The second contract—again, in whatever form as the record is unclear on this—was between two “other persons”: Drost and the Vicks. And Downey is the third, non-contracting person. Assuming that Downey actually did achieve some advantage from the landscaping improvements, which is disputed on the record, Downey would be the person who “benefitted” from the Drost/Vicks landscaping contract. *But there is absolutely no evidence that Downey committed some misleading act or requested the benefit of the landscaping improvements.*

Thus, it appears to me, the majority’s reliance on *Morris Pumps* stumbles at the outset: there is no misleading act and no request for the benefit of the landscaping improvements that leads us away from the Am Jur general rule. Accordingly, the inquiry into whether Downey, the non-contracting party, was “unjustly enriched and retained an independent benefit”³ may not have been triggered; *Morris Pumps* would therefore be instructive, but not controlling.

However, whether Drost and the majority have misread *Morris Pumps* is only a predicate question. Let us assume that Drost and the majority are wrong and *Morris Pumps* does not control. As the majority notes, MCL 600.2591(3)(a) states that a claim is frivolous when: (1) the party’s primary purpose “was to harass, embarrass or injure the prevailing party”; (2) [t]he party had no reasonable basis to believe that the facts underlying that party’s legal position were true”; or (3) “[t]he party’s position was devoid of arguable legal merit.”⁴

I cannot conclude that Drost’s claims were devoid of arguable legal merit, a most difficult standard to meet. Because a judge ultimately finds a party to have been wrong does not mean that party’s claim was automatically frivolous. There needs to be more—much more—and I am not prepared to conclude that there is a sufficient factual underpinning in this case to determine that the Drost’s claims were frivolous at either the trial or appellate court level.

Consequently, I concur in the majority’s result, despite my disagreement with its reasoning.

/s/ William C. Whitbeck

² *Morris Pumps*, 273 Mich App at 196, quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628 (emphasis supplied).

³ *Id.*

⁴ *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).